FILED
SUPREME COURT
STATE OF WASHINGTON
1/20/2022
BY ERIN L. LENNON
CLERK

No. 99956-2

---

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

---

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

IN:

DAVID J. DEARINGER and GANNA P. DEARINGER,
*Petitioners-Plaintiffs*,

v.

ELI LILLY AND COMPANY,
*Respondent-Defendant*.

---

# REPLY BRIEF OF PETITIONERS-PLAINTIFFS TO BRIEFS OF AMICUS CURIAE

---

David J. Dearinger, *pro se*
10218 38th Pl SE
Lake Stevens, WA 98258-5738
(425) 220-3690
daviddearinger@comcast.net

## TABLE OF CONTENTS

**Page**



## TABLE OF AUTHORITIES

**Page**

### Cases

**Statutes**

**Page**



**Other Authorities**

**Page**

## I. INTRODUCTION [1]

Forty-three years have passed since the State of Washington had adopted the Learned Intermediary Doctrine (LID) in *Terhune v. A.H.Robins Co*., 90 Wn.2d 9, 577 P.2d 925 (1978). As we follow the subsequent chain of events, we see that almost immediately after *Terhune* was decided, the Forty-Sixth Washington Legislature set into motion legislation that would become "The Washington Product Liability Act" (WPLA)(codified as RCW 7.72 *et seq*.) which is epitomized as "the most sweeping legislative involvement in Washington tort law in this century," Talmadge, P., [2] *Washington's Product*

---

[1] Mr. and Mrs. Dearinger appear *pro se* and as such they must prepare this brief without the assistance of a legal staff, not even a typist, in its preparation. Mrs. Dearinger, as an immigrant from the Ukraine, lacks sufficient proficiency in the English language while Mr. Dearinger must, because of his drug injury, type on a word processor using only two fingers of his right hand. It is therefore unavoidable that the Dearingers merge all *amicus* replies into one brief to reduce the amount of work required.

[2] Phil Talmadge served as a Washington State Senator from Legislative District No. 34 (1979–1995) and served on the Senate Select Committee on Tort and Product Liability Reform sponsoring Engrossed Senate Bill 3158 which would become the Washington Product Liability Act. Sen.

*Liability Act*, 1981, U. Puget Sd .L. Rev. 5:1, at pages 2-3, and was accomplished only "after many years of extremely bitter political conflict over product liability and tort reform." *Id*.

That "extremely bitter political conflict" revealed by Justice Talmadge is far from being concluded; this case exemplifies that. The certified question in this case, if distilled down to its essence, would simply ask "who should be responsible for plaintiff's drug injury?" The *manufacturer /marketer* of Cialis, as envisioned by the WPLA? Or the *physician* that prescribed the Cialis, as claimed by Washington Defense Trial Lawyers Association (WDTL) and the Pharmaceutical Research and Manufacturers of America (PhRMA)?

The WDTL and the PhRMA have both joined this case as Amicus Curiae and prefer to hold the prescribing physician liable for Mr. Dearinger's drug injury while a third amicus party, the Washington State Association for Justice Foundation

---

Talmadge is also a former member of this Court, having served one term, 1995-2001, as Associate Justice.

(WSAJF), prefers to follow the WPLA and hold the drug manufacturer liable once the manufacturer begins to behave like a candy company by marketing its pharmaceuticals directly to the consumer instead of marketing only to physicians like Washington courts have always expected of drug manufactures.

## II. ARGUMENT

### A. We Are Not a Nation of Lemmings

Our nation's ability to adapt is what saved us from fascism in the mid-Twentieth Century as American automobile factories retooled to make aircraft engines for the B-52s instead engines for luxury automobiles. That same adaptability will help us end the current pandemic as drug manufacturers refit for production of COVID-19 vaccines and therapeutics.

The WDTL's argument centers on the premise that all State courts should behave like lemmings and keep the LID the way it currently is only because that's the way it has always been for 40 plus years because nearly all other states did exactly

that, which is antithetical to the founding principles of federalism.

Justice Brandeis has instructed us that:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

The State of New Jersey has not imploded from the adoption of the DTCM exception in *Perez v. Wyeth Labs. Inc*., 161 N.J. 1, 734 A.2d 1245 (1999), despite the dismal projections of the WDTL and the PhRMA.

Yet the WDTL's unfortunate remarks apparently don't seem to apply when the discussion is about Washington State being one of only three states forbidding punitive damages. See *Maki v. Aluminum Bldg. Products*, 73 Wn.2d 23, 24-25, 436 P. 2d 186 (1968); in that instance being in the minority is not so bad, at least from the vantage point of the WDTL.

The WDTL's divination that "Washington would naturally become a target of forum shopping," even if true, would be far better than having patients "doctor shopping" [3/] for a physician, other than their family doctor, willing to risk prescribing a dangerous drug like Cialis® (which patent is now expired) to patients they don't even know.

Moreover, our very nation is an "outlier" as being one of only a pair of countries (New Zealand is the other) that allow any DTC marketing for drug companies whatsoever. Donohue J. *A History of Drug Advertising: The Evolving Roles of Consumers and Consumer Protection*. 2006, Milbank Q, 84(4), 659-699.

The other amicus party that favors blaming the doctor, PhRMA, seems to insist that adopting the DTCM exception will bring on the Apocalypse. The cure for cancer will forever go undiscovered, etc. if we hold drug companies accountable.

---

[3/] Some patients in Washington already currently go doctor shopping for a physician that will issue them credentials to purchase recreational marijuana for half-price down at the "Pot Store."

The Ely Lilly Company runs television commercials in prime-time to promote Cialis as a fountain of youth.

### B. Without the DTC Exception Drug Companies are Free to Mislead with Advertising

Drug companies play commercials on television where statements are made that resemble warnings that don't warn at all but instead mislead. The commercials mention priapism[4/] ("four hour erection") as a possible side effect, misleading consumers the impression that the company is issuing an exhaustive, comprehensive alert about of side effects. Naturally the consumer will assume that Cialis is safe because the commercial doesn't mention brain hemorrhages, only the desired effect of priapism. Most consumers don't realize that they were duped into thinking that the statement about priapism was a warning, when it was really an inducement.

---

[4/] To an impotent man priapism is actually an inducement, only *disguised* as a warning.

### C. *Stare Decisis* Does not Apply Here

The PhRMA entreats the Court that this is a case where s*tare decisis* is paramount, and the LID is sacrosanct and must remain pristine as the day it was minted.

However the Plaintiffs are not asking the Court to abolish the LID *in totum*; that would be a discussion for another day. However what Plaintiffs *are* asking the Court to do is only that it would exempt prescription drug manufacturers that no longer behave like prescription drug manufacturers but behave instead behave like candy companies.

While the PhRMA likes to remind us that the LID was already a "well-established rule" nationally when the Court adopted it in the *Terhune* case, PhRMA omits the fact that the product at issue in *Terhune,* the Dalcon Shield, was not marketed directly to the public, as is Cialis:

> the plaintiffs sought advice from their family physician, an osteopathic surgeon, regarding available methods of contraception. He informed them of the advantages and disadvantages of

> various methods, and they chose the Dalkon Shield.

*Terhune*, at 10.

The LID was adopted in Washington State with the Court's assumption that "the drug company targets its marketing efforts toward the physician, not toward the patient." See *e.g.* *Physicians Ins. Exch. v. Fisons Corp*., 122 Wn.2d 299, 313, 858 P.2d 154 (1993).

Because the Defendant Ely Lilly and Co. was assured of its impunity, it changed lanes [5/] and became the equivalent of a candy company for the purpose of directing its marketing efforts of Cialis as an expensive recreational drug directly "toward the patient," contrary to the expectation of Washington court. *Physicians Ins. Exch. v. Fisons Corp, supra.*

[5] Plaintiffs introduce the proposition that "commerce" is *not* merely a simple "stream" but a "multi-lane super-highway" with various lanes of traffic, lanes purposed by a particular product's level of dangerousness and consequences to the consumer. Plaintiffs posit that certain drug companies, like Defendant Eli Lilly Co., changed lanes from the one reserved for pharmaceutical companies (entitled to LID protection) to the lane reserved for candy manufactures (not entitled to LID protection).

**D. Without the DTC Exception Attorneys are Deterred From Helping Drug Injured Parties.**

Plaintiffs are on record in the court below that because of the LID no private attorney was willing to even consider the merits of Plaintiff's drug injury case because every attorney considered the case to be a lost cause due to the protection provided to drug companies by the LID. See Certified Record of U.S. District Court, Docket No. 19, Motion to Assign Counsel.

"The civil justice system deters misconduct. . . . The actual or potential imposition of civil tort liability changes the behavior of others." Popper, A., *"In Defense of Deterrence"* (2012), Albany Law Rev., 75.1, p. 181.

When drug companies know that attorneys are afraid to sue them, there will be nothing to stand in their way to mislead the public about the dangerousness of their product.

In their opening brief Plaintiffs attached eleven (11) scientific studies from five continents to demonstrate that Cialis

and other Phosphodiesterase-5 Enzyme Inhibitors can cause Intercerebral Hemorrhage. Yet despite this proof from the medical community, the drug companies, including Defendant Eli Lilly and Co. withheld this fact from not only the public at large but also prescribing physicians. Defendant would not have withheld that information if it feared lawsuits from drug injured consumers of Cialis.

This Court must adopt the DTC marketing exception to the LID to protect future victims of Phosphodiesterase-5 Enzyme Inhibitors because drug companies no longer fear the consequences of their tortuous conduct.

## III. CONCLUSION

Our country is at the watershed of momentous medical discoveries. Diseases and ailments that have troubled humanity for time immeasurable might soon be controlled with newly discovered pharmaceutical therapeutics.

While medical science advances, our means of communication also advances simultaneously. Every time we open our Facebook accounts or other social media we are inundated with pop-up windows that advertise a variety of merchandise that is sold for financial profit. As new medicines are invented so are new means of advertisement in media that have yet to be invented.

This Court may not soon have another opportunity to contemplate this unique relationship between Big Pharma and Madison Avenue, and decide whether pharmaceutical manufactures should be allowed to hide behind the LID when they market their product like it were chewing gum.

DATED: This 20th day of January, 2022.

Respectfully Submitted,

/s/ David J. Dearinger
David J. Dearinger, Plaintiff, *pro se*
10218 38th Pl SE
Lake Stevens, WA 98258-5738
(425) 220-3690 cell
daviddearinger@comcast.net

/s/ Ganna P. Dearinger
Ganna P. Dearinger, Plaintiff, *pro se*
10218 38th Pl SE
Lake Stevens, WA 98258-5738
(425) 220-3691 cell

## CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b) Plaintiffs hereby certify that this document contains 1,751 words, exclusive of the title page, table of contents, table of authorities, signature blocks, certificate of compliance, certificate of service, and appendix.

DATED: This 20th day of January, 2022.

Respectfully Submitted,

/s/ David J. Dearinger

David J. Dearinger, Plaintiff, *pro se*
10218 38th Pl SE
Lake Stevens, WA 98258-5738
(425) 220-3690 cell
daviddearinger@comcast.net

## CERTIFICATE OF SERVICE

I certify that, on this day, I sent a copy of this document via e-mail (by agreement under RAP 18.5(a) and CR 5(b)(7)) to the attorneys for the Respondent:

Anne M. Talcott, WSBA #26886
Email: atalcott@schwabe.com
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
and
Kainui M. Smith, WSBA #53877
Email: ksmith@schwabe.com
1420 5th Avenue, Suite 3400
Seattle, WA 98101

I also e-mailed this document to the attorneys for the three amicus curiae parties:

Washington State Association for Justice Foundation

Valerie D. McOmie, WSBA No. 33240
Email: valeriemcomie@gmail.com
4549 NW Aspen St.
Camas, WA 98607

and

Daniel E. Huntington, WSBA No. 8277
Email: danhuntington@richter-wimberley.com
422 Riverside, Suite 1300
Spokane, WA 99201

Washington Defense Trial Lawyers Association

Noah Jaffe, WSBA No. 43454
Email:njaffe@nicollblack.com
and
Daniel L. Syhre, WSBA No. 34158
Email:dsyhre@bpmlaw.com
701 Pike Street, Suite 1400
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: This 20th day of January, 2022.

/s/ David J. Dearinger

David J. Dearinger, Plaintiff, *pro se*
10218 38th Pl SE
Lake Stevens, WA 98258-5738
(425) 220-3690 cell
daviddearinger@comcast.net

**From:** OFFICE RECEPTIONIST, CLERK
**To:** "David J. Dearinger"
**Subject:** RE: Dearinger Reply Brief
**Date:** Friday, January 21, 2022 8:28:30 AM

---

Received 1-20-22

---

**From:** David J. Dearinger [mailto:daviddearinger@comcast.net]
**Sent:** Thursday, January 20, 2022 3:39 PM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Subject:** Dearinger Reply Brief

**External Email Warning!** This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, **DO NOT DO SO!** Instead, report the incident.

My name is David Dearinger and I am the pro se Petitioner in Dearinger v. Lilly No. 99956-2. I have experience difficulty with the portal so I have been submitting my briefs and motions to this email address.

I am asking that you send me confirmation that you received my Reply to the Amicus Briefs that was due today.

Thank you.

Sincerely,

David J. Dearinger

---

Virus-free. www.avg.com